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No. 02-938

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN K. CASTLE, *ET AL.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICUS CURIAE* PLAINTIFFS COORDINATING COMMITTEE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The Plaintiffs Coordinating Committee ("PCC") is a committee of lawyers appointed to represent certain common interests of the plaintiffs in the "*Winstar*-related" cases. At present, there are approximately 80 *Winstar*-related cases pending in that court or on appeal before the Federal Circuit.[1]

SUMMARY OF THE ARGUMENT

Throughout the 1980s, when the Government's savings and loan insurance fund was threatened with massive insolvency, the Government entered into contracts with financial institutions and investors under which the Government agreed to provide certain accounting and "regulatory capital" forbearances to induce those financial institutions and investors to acquire and recapitalize failing thrifts. After these Government promises were subsequently breached by enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), this Court held, in *United States v. Winstar Corporation*, 518 U.S. 839 (1996), that the United States could not assert special defenses to absolve it of ordinary contractual liability. Rather, this Court affirmed the principle that "allowing the Government to avoid contractual liability merely by passing any 'regulatory statute' would flout the general principle that, 'when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'"

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. Pursuant to Sup. Ct. R. 37.6, no part of this brief was drafted by any parties in this action. No monetary contribution for the preparation or submission of this brief was made by any entity other than the Winstar PCC and its clients, who are all plaintiffs in the *Winstar*-related cases, and none of whom are parties to this case.

Id. at 895 (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

This Court recently reaffirmed the fundamental proposition that lies at the root of *Winstar* – namely, that basic contract principles govern commercial claims against the Government just as they do claims against private parties – in a decision that reversed the Federal Circuit for refusing to follow a straightforward tenet of restitution set forth in the RESTATEMENT (SECOND) OF CONTRACTS ("RESTATEMENT"). *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000). As in *Mobil Oil*, "[t]he Restatement of Contracts reflects many of the principles of contract law that are applicable to this case." *Id.* at 608. Also as in *Mobil Oil*, however, the Federal Circuit has refused to apply those principles.

The decision below flies in the face of this Court's decisions in *Winstar* and *Mobil Oil*. As in *Winstar*, the Government in the contract at issue in this case promised to allow Petitioners to calculate their regulatory capital in a particular fashion in exchange for the Petitioners' investment into one of the dying thrifts that the Government was obligated to insure. Less than one year later, FIRREA breached the Government's promises and, as a result, the thrift became insolvent and was seized by the Government. By seizing the thrift, the Government also pocketed Petitioners' cash investment into the thrift. Now, after more than a decade of litigation, the Federal Circuit has permitted the Government to retain possession of Petitioners' investment, even while it purports to leave undisturbed the lower court's conclusions that the Government breached its contract with Petitioners and thereby caused the thrift to be seized.

The court achieved this perverse result by misinterpreting basic contract law in a way that conflicts with the decisions of the Ninth and Tenth Circuits, which, in accordance with this Court's holding in *Winstar*, awarded plaintiffs restitution under materially identical facts. *Far West Fed. Bank, S.B. v. Office of Thrift Supervision*, 119 F.3d 1358

(9th Cir. 1997); *RTC v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994). Thus, as Petitioners explain, the decision below creates a split in the circuits, and for that reason alone warrants this Court's review.[2]

Moreover, the Government's failure to abide by its commitments here led directly to the Government's seizure of Petitioners' business enterprise – a taking of property for which just compensation is owed. *See United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 (2002). Even in a highly regulated industry, the Government must provide compensation for the appropriation of an enterprise or other property where that conduct upsets property owners' "reasonable, investment-backed expectations" that are induced by an "explicit governmental guarantee" that the Government will not, in fact, seize or destroy the property. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1010-14 (1984).

The *Winstar* plaintiffs did the Government an enormous service by investing desperately needed capital to shore up the thrift industry. The Federal Circuit's jurisprudence in this case (and other similar cases) will not go unnoticed by the private sector, which will be reluctant to do business with the Government if these unjust decisions are allowed to stand.

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[2] The Government's opposition brief ("U.S. Br.") 15, 20-21, eventually acknowledges that the decision here conflicts with decisions of other circuits. Because the Federal Circuit purported to apply settled principles of contract law and not to create any special rule for government contract cases (*see id.* at 9), the split in the circuits goes to the heart of basic contract law. This conflict between the Federal Circuit and the other circuit courts has the potential to create confusion and inconsistent adjudication among the lower courts and to undo the clear framework this Court established in *Mobil Oil* and *Winstar*.

ARGUMENT

I. The Federal Circuit Held that the Government Does Not Have to Answer to Petitioners for Its Breach of Contract.

This case is but the latest of a series of cases in which the Federal Circuit has acquiesced to Government attempts to establish special rules for contracts with the Government, in contravention of this Court's holdings in *Mobil Oil* and *Winstar*.[3] Although the Court of Federal Claims has repeatedly called the Government to task for this behavior, the Federal Circuit has allowed the United States to thwart this Court's holding in *Winstar* on too many occasions.[4] This Court no doubt believed that it had discharged its supervisory function over these cases in 1996, when it issued a nearly 100-page opinion on the Government's liability for breach of contract. But the intransigence of the United States and the acquiescence of the Federal Circuit require this Court, once again, to step in and uphold the sanctity of contracts for those who do business with the Government.

Under this Court's decisions in *Winstar* and *Mobil Oil*, Petitioners are entitled to recover for breach of contract, as the Court of Federal Claims held. Petitioners Castle and

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[3] The Government has gone to extraordinary lengths to circumvent this Court's *Winstar* holding. *See, e.g., California Fed. Bank v. United States*, 39 Fed. Cl. 753 (1997) (describing Government's efforts to re-argue the issues resolved in *Winstar*).

[4] *See Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374 (Fed. Cir. 2001) (holding, contrary to the RESTATEMENT (SECOND) OF CONTRACTS § 373, that restitution of benefit conferred was not available); *California Fed. Bank, FSB v. United States*, 245 F.3d 1342 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) (same); *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001) (holding, as in *Castle*, that investor plaintiffs were not intended third party beneficiaries of *Winstar*-type contract despite clear satisfaction of requirements of RESTATEMENT (SECOND) OF CONTRACTS § 302).

Harlan, after a period of intense negotiation, submitted a Business Plan to the Federal Home Loan Bank Board (the "Bank Board") documenting that they would organize a group of investors who would infuse needed capital into Western Empire in exchange for the Government's agreement to allow the new entity to use certain accounting and regulatory forbearances going forward. The Bank Board subsequently approved the acquisition and the proposed Business Plan, and the parties entered into an express understanding pursuant to which the investors would recapitalize the thrift in exchange for the provision of accounting and regulatory forbearances to the thrift. Therefore, on December 30, 1988, FSLIC, Western Empire, Castle and Harlan executed a Regulatory Capital Maintenance Agreement ("RCMA"). On that same day, Castle, Harlan and the other members of the investor group made their investments in Western Empire in consideration for the Government's agreement to provide the accounting and regulatory forbearances. Notably, there was never any illusion on the part of the regulators that Castle, Harlan, and their colleagues would have made the investment if the promised regulatory capital treatment were not forthcoming.

According to the Federal Circuit, however, Castle and Harlan had to match the Government's promise to provide regulatory capital with their own promise to provide tangible capital. Pet. App. 21a. The court found it dispositive that there was no written promise by Castle and Harlan to make an investment in Western Empire. But there was no need to record such a promise on paper in order to form a binding contract because Castle, Harlan and the other investor group members actually put their money into Western Empire that very day. Although the Federal Circuit did not disturb the trial court's decision that Castle and Harlan entered into a contract that the Government had breached, the Federal Circuit's denial of any recovery to Castle, Harlan, and the other investors achieved the same effect as if the court had disregarded

Winstar altogether and declared that no contract had been formed.

In order to confirm the error of the Federal Circuit's reasoning, one need do nothing more than consult the RESTATEMENT § 30 and § 72. Section 30, "Form of Acceptance Invited," states:

> (1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.
>
> (2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

Section 72, "Exchange of Promise for Performance," states: "Except as stated in §§ 73 and 74 [neither of which is applicable here], any performance which is bargained for is consideration."

Here, Petitioners chose to accept the Government's offer to provide regulatory capital in exchange for an investment of tangible capital by investing an amount sufficient to recapitalize Western Empire. As explained by Professor Corbin, the exchange of a promise for a promise is sometimes referred to as a "bilateral contract" and an exchange of a promise for performance is referred to as a "unilateral contract":

> In all cases of "bargain," one party offers his promise in exchange for a specified consideration; and in order to "close the deal" and make a "contract" that consideration must be given. If this consideration is action or forbearance instead of a promise, the resulting contract is "unilateral"; it nevertheless takes two to make it.

A. Corbin, CORBIN ON CONTRACTS 32-33 (One Vol. ed. 1952). Most offerors would consider the actual contemporaneous payment of the consideration to be preferable to a promise to pay the consideration sometime in the future, and

surely the Government did here. But in either case, a contract is made, the breach of which entitles the injured party to relief. The Federal Circuit ignored this hornbook law in its effort to draw a spurious distinction between *Mobil Oil* and *Winstar* on the one hand and this case on the other. This Court should not allow its *Winstar* decision to be ignored in this way.

The error of the Federal Circuit's reasoning is also demonstrated by decisions of the Ninth and Tenth Circuits, which required the Government to answer to those investor plaintiffs for breaching contracts in *Winstar*-style acquisitions materially identical to that presented in *Castle. Far West*, 119 F.3d 1358 (9th Cir. 1997); *RTC v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994). Those courts did not distinguish between contracts accepted by a promise and contracts accepted by performance.

II. The Federal Circuit's Decision Ignores this Court's Decision in *Mobil Oil*, Elementary Principles of Contract Law, and the Decisions of Other Courts of Appeals.

This Court's decision in *Mobil Oil* and Section 373 of the RESTATEMENT makes clear that restitution, in the form of a return of their investment, is an available remedy to Petitioners. Section 373 provides that restitution is available to a breach of contract victim "for any benefit that he has conferred on the other party by way of part performance or reliance." As this Court explained in *Mobil Oil*, a case in which Petitioners also sought restitution of money they had paid under a contract the Government had repudiated, the RESTATEMENT compels that:

> If the Government said it would break, or did break, an important contractual promise, thereby "substantially impairing the value of the contracts" to the companies, then (unless the companies waived their rights to restitution) *the Government must give the companies their money back*. And it must do so whether the contracts

> would, or would not, have ultimately proved financially beneficial to the companies.

530 U.S. at 608 (internal citation omitted) (emphasis added).

This passage from *Mobil Oil* describes the circumstances of this case. Remarkably, however, the Federal Circuit's opinion does not even cite, let alone discuss, *Mobil Oil*.[5] Indeed, the $15 million initial outlay that Petitioners seek here, like the $156 million investment that the plaintiffs sought and obtained as restitution in the *Mobil Oil* case, was the benefit that Petitioners conferred on the Government. In accordance with RESTATEMENT § 373, therefore, Petitioners are entitled to recover the value of that "benefit conferred" under a restitution theory. The Federal Circuit's failure to follow *Mobil Oil* in this case was in error.

The trial court in this case found that "what the government bargained for and received was an infusion of capital into an ailing bank and the subsequent operation of that bank in accordance with an approved business plan." Pet. App. 91a-92a. The Federal Circuit did not disturb this factual finding in any respect. Nevertheless,

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[5] Instead, the Federal Circuit cites solely to its own recent decision in *Landmark Land Co. v. Federal Deposit Insurance Corp.*, 256 F.3d 1365 (Fed. Cir. 2001), for the proposition that a plaintiff may not recover under a restitution theory monies that it contributed voluntarily. But in *Landmark*, the Federal Circuit (i) affirmed an award of restitution of the initial investment the plaintiff made in an ailing thrift at the time the plaintiff contracted with the Government, and (ii) denied the plaintiff's claim for restitution of a subsequent investment made for business purposes that the trial court concluded were unrelated to its contract with the Government. *Id.* at 1373, 1375-77. In *Castle*, the Federal Circuit cited the latter holding in *Landmark*, which is inapposite here, and ignored the former holding, which fully supports Petitioners' claim for restitution of the initial investment they made at the time of contract for the specific purpose of obtaining favorable regulatory capital treatment.

as explained above, it reversed the trial court's award of restitution, on the asserted basis that Petitioners had contributed their investments "voluntarily" – that is, there was no written contract provision under which Castle or Harlan expressly *promised* to invest their own money. Pet. App. 21a.

In reaching this result, the court below confused a clause of the RCMA under which Castle and Harlan individually were not required to *maintain* the tangible capital of Western Empire *following the initial acquisition and recapitalization of the thrift* with the consideration Castle and Harlan provided by investing their capital into the thrift in the first instance. As the trial court found, however, the Government's promise of accounting and regulatory capital forbearances was the consideration for Castle and Harlan to organize a group of investors to recapitalize Western Empire. The fact that Castle and Harlan may not have agreed individually to maintain the thrift's capitalization at a particular level *following* the initial recapitalization is irrelevant to whether restitution is available as a remedy for the Government's breach. *See Mobil Oil*, 530 U.S. at 608.

In addition to flouting the direction of this Court in *Winstar* and *Mobil Oil*, the Federal Circuit's reasoning and result conflicts with the *Far West* and *RTC v. FSLIC* decisions. Had this case been filed in either the Ninth Circuit or the Tenth Circuit (or any other circuit that adheres to the RESTATEMENT), Petitioners plainly would have been awarded damages in the amount of their initial investment.

III. In Holding that the Other Investor Group Members Were Not Third Party Beneficiaries of the Contract, the Federal Circuit Misinterpreted a Decision of this Court and Created a Direct Conflict with a Decision of the Ninth Circuit.

The Court of Federal Claims correctly found that the investor group members who became shareholders upon their investment in Western Empire were the intended third-party beneficiaries of the promises the Government made to Castle and Harlan, which promises had induced the investor group members to make the investment that the FSLIC sorely wanted them to make. Pet. App. 122a.[6]

Nevertheless, the Federal Circuit reversed this holding, asserting that the investor group members other than Castle and Harlan were merely "indirect" third-party beneficiaries who had no standing to sue for breach. Pet. App. 17a-18a. In effect, the court assumed that the purpose of entering into an agreement for the provision of regulatory capital, and presenting it to the prospective providers of capital, was not to induce the investors to invest, but for some other, unimaginable purpose. The facts were, however, that the Government's promise was made to get the investors to invest their capital, not to get the failing thrift to do anything. Indeed, Western Empire was not in a position to raise capital unless the investors got a binding promise from the Government.

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[6] Alternatively, the investor group members other than Castle and Harlan are also correctly understood to be direct contract parties with the Government. They had been identified to the Bank Board and invested the money the Bank Board determined to be sufficient to recapitalize the thrift. The fact that they did not also give their signatures is irrelevant. The situation, regardless of whether it contained other contracts as well, clearly involved a unilateral contract.

The well-settled law of third-party beneficiary standing boils down to this: where the parties to a contract intend to benefit a third party, that intention will be honored and the intended beneficiary shall have standing to seek damages for breach. Reflecting this principle, section 302 of the RESTATEMENT provides that a third-party is an *intended* beneficiary of a contract if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intentions of the parties" and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." These conditions are met here. The trial court in *Castle* found as a fact that the contracting parties intended to benefit the shareholder-plaintiffs, a finding left undisturbed by the Federal Circuit. Pet. App. 122a.

In accordance with this Court's precedent, *see Winstar*, 518 U.S. at 895; *Mobil Oil*, 530 U.S. at 607-08, the Federal Circuit was required to apply the two-prong test of RESTATEMENT § 302 in determining whether the investors in this case had standing to sue. Nevertheless, the Federal Circuit jettisoned the RESTATEMENT test in favor of a "more stringent" standard that would disregard the intent of the contracting parties and allow shareholder-plaintiffs to recover only if they could demonstrate that the RCMA was intended to benefit them "personally, independently of [their] status as [ ] shareholder[s]." Pet. App. 17a (citation omitted). On its face, this articulation makes no sense, and further analysis does nothing to support it.

As its purported support for this new test, the Federal Circuit relied on its recent decision in *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001), in which it held that the shareholders of another thrift could not recover damages resulting from the Government's breach of a *Winstar*-type contract. The reasoning of *Glass*, however, is based upon a misapplication of this Court's decision in *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220 (1912). In *German Alliance*, a water company entered into a contract with a city to supply fire hydrants to the

city. When a building burned down for lack of a properly located hydrant, the building's insurer sued the water company. Unlike here, the interest that the insurer was seeking to vindicate was shared by every taxpayer in the city. *Id.* at 230. It was in this very different context that this Court held that "[b]efore a *stranger* [to a contract] can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit." *Id.* (emphasis added).[7]

Moreover, the Federal Circuit in *Glass*, and by extension in this case, also misapplied the "derivative standing" rule as a basis for rejecting the intended third-party beneficiary status of the shareholder-plaintiffs. *See Glass*, 258 F.3d at 1354 (citing *Robo Wash, Inc. v. United States*, 223 Ct. Cl. 693, 697-98 (1980)). Contrary to the decision in this case and the Government's argument (U.S. Br. 17-18), the derivative standing rule does not apply where, as here, the shareholder is either a party to, or an *intended* third-party beneficiary of, the corporation's contract. *See Hunter v. Old Ben Coal Co.*, 844 F.2d 428 (7th Cir. 1988) (finding stockholders had standing to pursue breach claim arising out of contract between the corporation and the defendant where the stockholders were intended third-party beneficiaries of corporation's contract); 12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5911 (Perm. ed. 1993) ("If the injury is one to the

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[7] Contrary to the Government's argument, this Court has never applied the *German Alliance* "direct benefit" test in a commercial contract case where the contract was specifically intended to benefit a particular class of individuals, as opposed to the public at large. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307-08 (1927), the only decision of this Court cited by the Government for this proposition (U.S. Br. 17), was an admiralty case in which the charter at issue was not intended to benefit the plaintiff. Here, by contrast, the trial court determined that the contract was expressly intended to benefit the members of the Castle and Harlan investor group.

plaintiff as a shareholder as an individual, and not to the corporation, *as where the action is based on a contract to which the shareholder is a party*, or on a right belonging severally to the shareholder . . . it is an individual action.") (emphasis added).

The Federal Circuit's errors in this regard have resulted in a decision that is contrary to the parties' clear intentions, contrary to the RESTATEMENT, and irreconcilable with the decision of at least one other circuit in a *Winstar*-type case. *See Far West*, 119 F.3d at 1364 (holding that investors in a *Winstar*-type transaction had standing as intended third party beneficiaries to recover the full amount of their initial investment under a restitution theory). Notably, the Federal Circuit summarily rejected the conflicting *Far West* decision by acknowledging that the Federal Circuit in *Glass* had "adopted a test more stringent than the one applied in *Far West*." Pet. App. 16a. The acknowledged conflict between the circuits could not be starker.

Unless this Court corrects the Federal Circuit's errors, the decision below has the potential, in contravention of *Winstar* and *Mobil Oil*, to establish an aberrant test for determining intended third-party beneficiary status for Government contracts – a test that wholly disregards the contracting parties' intent.

IV. *Castle* Is Inconsistent with this Court's Prior Decisions Under the Takings Clause.

The trial court found that the Government would not have had any grounds for seizing Western Empire in February of 1990 had it not been for its breach of the contractual promises it made to the investors it induced to acquire the thrift. Pet. App. 62a-64a. Nevertheless, after nullifying the award of contractual damages, the Federal Circuit summarily held that the owners of Western Empire could not possibly state a claim under the Takings Clause. Pet. App. 24a-26a. Thus, the owners of a bank

with over half a billion dollars in assets were told that the Government could cause its thrift to run out of regulatory capital by breaking its promise, and could then seize that thrift without having to pay a cent of just compensation.

As Petitioners explain, the Federal Circuit achieved this perverse result by improperly bifurcating Petitioners' property. Pet. 24-30. As we explain below, the *Castle* decision also rests upon a profound misconception of the nature of "regulated property," and a fundamentally flawed understanding of the relationship between contractual claims and claims under the Takings Clause.

A. The Takings Clause Applies to Regulated Financial Institutions.

The Government placed Petitioners' thrift in receivership and thereby directly appropriated Petitioners' property for a public use. Absent more, the Government's seizure of the enterprise would trigger an obligation to pay just compensation for the loss of that property. *See United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (Government's seizure of possession and control of a business enterprise for "bona fide" public purposes was a taking). *See also Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). As this Court explained just last year, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra*, 535 U.S. at 322. In such a case, the requirement of compensation is automatic; the Court "do[es] not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use." *Id.* at 323.

In reliance upon the Federal Circuit's categorical suggestion in this case that seizure of a bank for "failure to meet regulatory capital requirements does not constitute a taking," Pet. App. 24a, the Government has suggested that it is not possible for it to be held liable under the Takings

Clause for the seizure of a regulated financial institution that has failed to meet whatever capital requirements the Government has decided to impose, no matter how contrary subsequent Government actions are to prior assurances given to the institution's owners.[8] To be sure, in an industry "that has long been the source of public concern and the subject of government regulation," owners of business enterprises might enter into the industry on the understanding, and with the expectation, that the Government may seize, condemn or destroy their property in cases where the enterprise causes, or threatens to cause, certain social harms. *Ruckelshaus*, 467 U.S. at 1007-08 But as this Court's decision in *Monsanto* demonstrates, even in such a highly regulated industry – where owners must *ordinarily* expect that the Government can destroy property interests that cause harm to the public interest – the Government must nevertheless provide compensation for the destruction or appropriation of the property where that conduct upsets enterprise owners' "reasonable, investment-backed expectations" that are induced by an "explicit governmental guarantee" that the Government will not, in fact, seize or destroy the property. *See id.* at 1010-14.

In *Monsanto*, the Court held that after a statutory amendment in 1978, Monsanto was on notice that the Government might publicly reveal – and thus destroy – trade secrets contained in data submitted by Monsanto, and therefore Monsanto had no "reasonable investment-backed expectation" that the Government would keep such secrets confidential. *Id.* at 1005-08. By contrast, in the period from 1972-1978, a federal statute gave Monsanto "explicit assurance that EPA was prohibited from disclosing publicly . . . any data submitted by an applicant if both the applicant and the EPA determined the data to constitute

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[8] *See, e.g.*, U.S. Br. 22 ("[T]he court of appeals was correct in finding that petitioners could not have reasonably expected that the thrift would be immune from seizure under the regulatory scheme.").

trade secrets." *Id.* at 1011. This "explicit governmental guarantee formed the basis of a reasonable investment-backed expectation" that the Government would not destroy the property through disclosure, *id.* – and therefore the Government could not in that period require Monsanto to make its trade secrets subject to public disclosure as a condition of approval to market pesticides in the United States. *Id.* at 1011-14.

Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), although the petitioners had voluntarily connected their pond to a navigable waterway, and although the United States has a longstanding and well-established right to require free public access to all navigable waterways, this Court held that the Government could not insist upon public access to the pond unless the Government provided compensation for the loss of the petitioners' right to exclude. Crucial to this decision was the fact that the petitioners in that case had joined their pond with the navigable bay "with the consent of the Government," which, while it did not estop the Government from seeking to regulate the pond, led to "the fruition of a number of expectancies embodied in the concept of 'property' [that] . . . the Government must condemn and pay for before it takes over [that property]." *Id.* at 179.[9]

The Acting Solicitor General attempts to distinguish *Monsanto* and *Kaiser Aetna* on the ground that, "[a]lthough in each [of those] case[s] the government had

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[9] *See also Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (rejecting the argument of the United States that retroactive imposition of liability on a former coal-mining business could be justified because participation in regulated industries makes *all* liabilities foreseeable); *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001) (restriction placed upon heavily-regulated property can constitute a taking even where the claimant acquired his property *after* the Government enacted the restriction).

made a commitment of some sort that was relevant in assessing whether the property owner had an investment-backed expectation, neither case involved a contract." U.S. Br. 25. This is, indeed, a salient distinction – but it is a distinction that makes this an even *stronger* case for a compensable taking of property than either *Monsanto* or *Kaiser Aetna*. The "guarantee" that formed a reasonable expectation in *Monsanto* was simply a statute, 467 U.S. at 1010-11, which, unlike a negotiated agreement, can be repealed at any time, and which therefore can ordinarily be retroactively annulled without constitutional implications. *See, e.g., Concrete Pipe & Prods. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 645-46 (1993). And the petitioners' reasonable expectations in *Kaiser Aetna* were based upon nothing more than the *passive "acquisce[nce]"* of "individual officials representing the United States" – a guarantee so inchoate in character that it could not even estop the Government from seeking to regulate the pond. 444 U.S. at 167, 179.

If the *non-contractual* governmental guarantees in *Monsanto* and in *Kaiser Aetna* created reasonable expectations that the Government would not destroy the property interests in those cases, such that the violation of those expectations *automatically* triggered the obligation of fair compensation, then surely such compensation is owed where the Government seizes the bank of an investor who relied upon the Government's much more concrete and *enforceable contractual promise* that the bank would be effectively exempt from the seizure-triggering regulatory requirements.

This conclusion is not affected by the fact that the bank here was unable to satisfy regulatory requirements that the Government itself imposed after Petitioners had been induced to rely upon the Government's promises. If, for example, the Government decides it must seize the largest commercial banks in the country in order to fight

the war on terrorism, it may not avoid paying just compensation to the owners of those banks simply by first passing a regulation raising their capital requirements to unachievable levels. Just as it is reasonable for bank owners to expect that the Government will not seize healthy banks by willfully causing them to fall out of regulatory compliance, so too must it be reasonable for bank owners to expect that the Government will not seize their banks by breaching an express contract that was necessary to keep them from becoming noncompliant.

B. The Theoretical Possibility of Remedies for Breach of Contract Does Not Defeat the Petitioners' Takings Claims.

The Federal Circuit held that because FIRREA did not take from the Castle investors any of "'the range of remedies associated with the vindication of a contract,'" it therefore did not require the Government to pay just compensation. Pet. App. 24a-26a (citation omitted). This conclusion renders virtually meaningless the longstanding authority from this Court that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934).

Normally, the availability of standard contract remedies under the Tucker Act ensures that when the Government breaches its contract (thereby abrogating property rights under *Lynch*), its nonbreaching contract partner will recover its reasonable investment-backed expectations. *See generally Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978). But where the Government's breach of contract has caused other property owned by its contracting partner to be lost – indeed, to be seized by the Government – the Takings Clause is implicated. Here, the trial court found that, but for the Government's breach, there would have been no grounds for seizing Western Empire in February of 1990. Pet. App. 62a. Whatever

reason is given for denying Petitioners' contractual damages for the Government's seizure of Western Empire, there can be no justification for denying them just compensation under the Takings Clause, because Castle and his fellow investors undeniably had a reasonable, investment-backed expectation that the Government *either* would honor its contract, *or*, in the event of breach, would at least remedy that breach so as to avoid the further, catastrophic consequence of seizing their entire bank. Petitioners' claim under the Takings Clause is not an attempt to achieve specific performance of their contract; rather, it rests upon the simple proposition that when the combined effect of the Government's breach and its failure promptly to pay damages has *caused* the bank to fall short of the Government's own newly minted standards for capitalization, and therefore to be seized by the Government, the owner of the bank has lost property that he reasonably expected not to lose.

CONCLUSION

For the reasons set forth in the petition for certiorari and herein, *amicus curiae* PCC respectfully requests that the Court grant the petition for certiorari in this case and correct the manifest errors in the decision of the court below.

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